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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 395

MRS. NELLIE GOINS HALL, Widow of James Oscar Hall, Deceased,

Petitioner,

vs.

FIRST NATIONAL BANK OF ATLANTA, Executor of the Estate of James Oscar Hall,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

Lucian J. Endicott,
205 P'tree Arcade,
Atlanta, Ga.,
Attorney for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No.

MRS. NELLIE GOINS HALL, WIDOW OF JAMES OSCAR HALL, DECEASED

Petitioner,

vs.

FIRST NATIONAL BANK OF ATLANTA, EXECUTOR OF THE ESTATE OF JAMES OSCAR HALL

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

• • • • • • •

To the Honorable Chief Justice of the United States and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, Mrs. Nellie Goins Hall, widow of James Oscar Hall, deceased, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Georgia entered in the above cause (R-A-84-90) March 11, 1954 and numbered and entitled in said Court "*Hall, Plaintiff in Error* v. *First National Bank of Atlanta,* Executor, Defendant in Error, No. 35094" officially reported in 89 Ga. App. 853, 81 S. E., 2d 522. App. A & B. Petition for rehearing was denied by said Court on March 31, 1954 (R-A-103),

and Plaintiff in error filed a petition (R-C-1-15) in the Supreme Court of Georgia for a writ of certiorari, numbered and entitled in said Court "*Hall, Petitioner,* v. *First National Bank of Atlanta,* Executor, Respondent, No. 18609", no official report other than denial. Certiorari was denied June 14, 1954 (R-C-16). Petition for reconsideration of certiorari (R-D-1-20) was filed and denied July 14, 1954 (R-D-21), at which time the judgment of the Court of Appeals of Georgia became final.

July 19, 1954 the Court of Appeals of Georgia granted to Petitioner a stay of remittitur (R-A-105) for 90 days in order to permit this Petition for Certiorari.

Petitioner shows that a review of the two previous official reports in said case is necessary for a clear understanding of this certiorari, i. e., *Hall* v. *First National Bank of Atlanta,* 85 Ga. App. 498, 69 S. E., 2d 679, and *Hall* v. *First National Bank of Atlanta,* 87 Ga. App. 142, 73 S. E., 2d 252.

I

Jurisdiction

The jurisdiction of this Court is founded on Title 28 U. S. Code, Sec. 1257 (3), a right being especially claimed under the Constitution of the United States, Article XIV, Sec. 1. (App.)

II

Questions Presented

1. The first question presented is whether or not the Appellate Courts of Georgia can confer jurisdiction upon the Court of Ordinary contrary to statutory enactment and contrary to the law of the case, and deprive Petitioner of her vested rights and vested property, vested in her strictly according to the rules of law as made and provided by

Statute, without being guilty of denying to petitioner her constitutional right to due process of law and to equal protection under the law as guaranteed and contained in Article XIV, Sec. 1, of the Constitution of the United States.

2. The second question presented is: Can the Appellate Courts of Georgia deprive Petitioner of her vested rights and vested property, vested in her strictly according to the rules of law as made and provided by Statute, by interpreting a mere contract for support and maintenance of the wife, while living separate and apart from the husband, as being a waiver of a statutory right to a Year's Support, when said contract makes no reference to waiving said right, was based on a divorce action pending, was denied by the State Courts in a second divorce action, and is not permanent alimony as defined by statute, without being guilty of denying to Petitioner her constitutional right to due process of law and to equal protection under the law as guaranteed and contained in Article XIV, Sec. 1, of the Constitution of the United States?

III

Statutes Involved

This case involves the violation of the Constitution of the United States, Article XIV, Sec. 1. (App. 3)

IV

Summary Statement of Matter Involved

May 2, 1951 Petitioner, as the widow and sole heir at law of James Oscar Hall, deceased, petitioned the Court of Ordinary of Fulton County, Georgia (R-A-15-18), under Ga. Statute, 113-1002 (App.), for a Year's Support out of the estate of her deceased husband, said right having vested in her by law immediately upon the death of her

husband, Ga. Statute, 113-1002, which statute was previously determined and applied by the State Court in *Nixon* v. *Nixon* (1943) 69 Ga. App. 667, 26 S. E. 2d 722 (2, 3).

Certain property was set aside to Petitioner by appraisers which, under Ga. Statute, 113-1006 (App.), immediately vested in Petitioner. The setting aside of said property was confirmed by the Ordinary and on June 4, 1951 a valid statutory judgment (R-A-17), confirming the setting aside of said property, was signed and recorded by the Ordinary in due form of law under Ga. Statute, 113-1005 (App.).

Approximately three weeks later, during the same Term of Court, Respondent filed an equitable petition (R-A-19-21) in the Court of Ordinary, a Court of Law, petitioning said Court to set aside Petitioner's valid statutory judgment for the Year's Support.

Petitioner filed a motion to dismiss (R-A-26) Respondent's equitable petition on the grounds that Respondent was not an interested party and further that Respondent had been properly notified as required by law, had filed no objections prior to the final judgment, and, therefore, was precluded from attacking said final judgment. Ga. Statute, 113-1005 (App.). Petitioner also filed a general demurrer (R-A-27) to Respondent's petition on the grounds that said petition was fatally defective as it set forth no legal cause of action. After hearings, the Ordinary overruled Petitioner's motion to dismiss and her general demurrer, set aside her valid statutory judgment for the Year's Support (R-A-28), and allowed Respondent to file a caveat (R-A-24) to the return of the appraisers contrary to Ga. Statute, 113-1005, (App.), and contrary to law as laid down by the Supreme Court of Georgia in *Pierce* v. *Harrison,* 199 Ga. 197 (1945) (3) b (all justices concurring) wherein said Court held that a purely equit-

able claim, based on an alleged contract was without the jurisdiction of the Court of Ordinary. Petitioner filed exceptions pendente lite (R-A-29-30) to these rulings of the Ordinary.

Petitioner appealed (R-A-31) said rulings of the Ordinary to the Superior Court of Fulton County, Georgia and, after hearings, the Judge of the Superior Court held that the Court of Ordinary, as a Court of Record, had control over its orders and judgments during the term in which they are made and in the exercise of sound discretion, may revise or vacate same, and remanded the case to the Court of Ordinary for further disposition.

Petitioner appealed this decision of the Superior Court to the Court of Appeals of Georgia, 85 Ga. App. 498, and said Court held that only fraud would give the Ordinary, or the Superior Court on Appeal from the Court of Ordinary, jurisdiction and power to set aside this valid statutory judgment; further, that an appeal to the Superior Court is a de novo investigation and such a case must be tried anew as if no trial had been had; reversed the Superior Court and remanded said case for a de novo investigation.

Upon the de novo trial in the Superior Court, Respondent filed an amendment (R-A-33-36), which showed on its face that Respondent's failure to file a caveat and pleadings at the proper time in the Court of Ordinary, as required by law, was due to gross negligence. Said amendment was denied by the Court (R-A-39). Petitioner renewed her general demurrer (R-A-40) to Respondent's petition and caveat, and, after hearings, the Judge of the Superior Court overruled Petitioner's renewed demurrer (R-A-40), set aside Petitioner's valid statutory judgment for the Year's Support, and allowed Respondent's caveat contrary to the law of the case, 85 Ga. App. 498. Petitioner

contended then and now contends that when the Judge disallowed Respondent's amendment (R-A-39) the Court then and there admitted that Respondent had no legal cause of action to be in court.

Petitioner again appealed to the Court of Appeals of Georgia, 87 Ga. App. 142, on the grounds that the Superior Court was bound by the first decision of the Court of Appeals, 85 Ga. App. 498, the law of the case, nothing having developed upon the subsequent trial of the case that would make said decision of the Court of Appeals inapplicable under the facts, there being no fraud involved. That under statutory law the Court of Ordinary had no jurisdiction to set aside a valid statutory judgment for a Year's Support and, said case being on appeal, the Superior Court likewise had no greater jurisdiction to act in this matter, therefore, Petitioner's renewed demurrer was good and should have been sustained.

The Court of Appeals considered these questions for a full term and then, being divided in its opinion, directed the Clerk of said Court to write a letter (R-A-110) to counsel for both parties and obtain additional briefs based solely on three pertinent issues of fraud. Briefs were properly filed by both parties and the Court of Appeals then considered the issue of fraud for another term of court. Thereafter, a majority of the Court affirmed the ruling of the Superior Court and remanded the case for trial, Honorable Justice Jule W. Felton dissenting, 87 Ga. App. 147, 8, 9.

Petitioner filed a petition for writ of certiorari in the Supreme Court of Georgia, No. 18084, to review said judgment of the Court of Appeals. A majority of the Supreme Court denied certiorari (R-B), Honorable Chief Justice W. H. Duckworth dissenting and Honorable Justice Atkinson not participating. Petitioner filed for a reconsidera-

tion which the same majority denied and said case was returned to the Superior Court for a trial of the issues.

In 87 Ga. App. 142, when a majority of the Court conferred jurisdiction upon the Court of Ordinary contrary to Statutory enactment and contrary to the law of the case as laid down in 85 Ga. App. 498, and, further, when a majority of the Supreme Court denied Petitioner a writ of certiorari, the majority of said Appellate Courts then and there injected the Federal question into the case for the first time. Wherefore, upon the trial of the issues in the Superior Court, which was the first opportunity presented to Petitioner in the conduct of the case after the Appellate Courts had made such an unexpected ruling, 87 Ga. App. 142, which ruling could not have been reasonably anticipated and which ruling, as stated above, injected the Federal question into the case for the first time, Petitioner raised objections in said trial court by amending her appeal and adding thereto an amendment (R-A-41-44) setting forth that the Appellate Courts of Georgia, in conferring jurisdiction upon the Court of Ordinary contrary to Statutory enactment and contrary to the law of the case, had deprived Petitioner of her vested rights and her vested property without due process of law and without equal protection under the law as guaranteed and contained in the Constitution of the United States, Article XIV, Sec. 1, and as guaranteed and contained in the Constitution of the State of Georgia, Secs. 2-102 and 2-103 (App.).

Petitioner's said amendment was brought at the proper time, was good, met all the requirements of law, was allowed and ordered filed (R-A-45), and, after hearings, the Judge of the Superior Court set aside his order allowing the amendment (R-A-45) and directed a verdict for Respondent based on an alleged contract (R-A-74-76), which decision denied Petitioner her vested property and her

vested right to a Year's Support out of the estate of her deceased husband.

Petitioner petitioned the Superior Court for a new trial (R-A-54-82), which was denied (R-A-83), whereupon she filed her direct bill of exceptions (R-A-1-14 to the Court of Appeals of Georgia, 89 Ga. App. 853, which decision is the subject of this Petition for Certiorari. Opinion and Judgment set out in App. A. & B.

Petitioner filed a petition (RC-1-15) for a writ of certiorari in the Supreme Court of Georgia and upon the Supreme Court denying certiorari (R-C-16) filed a petition (R-D-1-20) for reconsideration, which was also denied (R-D-21), the date of said final decision being July 14, 1954. Petitioner's motion for a 90 day stay of remittitur in the Court of Appeals of Georgia was granted (R-A-105) on July 19, 1954 to permit this Petition for Certiorari.

V

Argument and Reasons for Allowance of Writ

The following cases are cited or referred to in support of Petitioner's contentions:

Howell v. *Howell,* 190 Ga. 371-4 (1940).
Copperweld Steel Co. v. *Industrial Commission of Ohio* (1945) 65 S. Ct. 1006, 324 U. S. 780, 89 L. Ed. 1363.
Angel v. *Gullington, N. C.* (1947), 67 S. Ct 657, 330 U. S. 183, 91 L. Ed. 832.
Urie v. *Thompson, Mo.* (1949), 69 S. Ct. 1018, 337 U. S. 163, L. Ed. 1282.
Hayes v. *Hayes,* 191 Ga. 237.
Butler v. *Mill* (1944) Cal., 144 P. 2 d 91.
Gavette v. *Gavette,* 104 Colo. 71, 88 P. 2 d 964.
Mullally v. *Mullally* (1945), 199 Ga. 708, 709 (3), 35 S. E. 2 d 199.
Young v. *Ragen, Ill.* (1949), 69 S. Ct. 1073, 337 U. S. 235, 93 L. Ed. 1333.

Arenas v. *U. S.*, 322 U. S. 419, 88 L. Ed. 1363, 64 S. Ct. 1090.

* * * * * * *

This case involves the deprivation of vested rights and vested property by the denial to Petitioner of the rights guaranteed to her in Article XIV, Sec. 1, of the Constitution of the United States.

First, the Appellate Courts of Georgia have conferred jurisdiction upon the Court of Ordinary contrary to statutory enactment and contrary to all previous interpretations and applications of said statute by said Appellate Courts, *Howell* v. *Howell,* 190 Ga. 371-4 (1940), and contrary to the law of the case, *Hall* v. *First National Bank of Atlanta,* 85 Ga. App. 498. This decision of the Appellate Courts has sanctioned such a departure from the accepted and usual course of judicial proceedings by the lower courts as to call for an exercise of this Court's power of supervision.

This is a Federal question of substance previously determined and applied by this Court in *Copperweld Steel Co.* v. *Industrial Commission of Ohio* (1945) 65 S. Ct. 1006, 324 U. S. 780, 89 L. Ed. 1363.

The facts in the Copperweld case are very similar to Petioner's case with reference to the jurisdictional question in that the Courts of Ohio conferred jurisdiction upon the Industrial Commission contrary to statutory enactment, whereas, the Courts of Georgia have conferred jurisdiction upon the Court of Ordinary contrary to statutory enactment.

This Court granted a certiorari in the *Copperweld* case, reversed the Supreme Court of Ohio, and held:

"Where in original proceeding in Ohio Supreme Court an employer unsuccessfully challenged Workman's Compen-

sation awards made to certain of its employees on ground that injuries suffered were not incurred in course of and did not arise out of employment, that awards were therefore beyond jurisdiction of the Industrial Commission and that unless they were abrogated employer would be deprived of its property without due process of law and unless relief were afforded employer would be denied equal protection of the laws, questions under U. S. C. A. Constitution, Amendment 14, were presented and decided so that United States Supreme Court had jurisdiction to review the decision on certiorari."

In the opinion of the Copperweld case this Court further held that, based on the Ohio statute, in order for the Industrial Commission to have jurisdiction, the employees' injuries had to arise out of and in the course of their employment, and that this question of fact had to occur in order for the Industrial Commission to acquire jurisdiction, and that an award made without such jurisdiction deprived the employer of property without due process of law contrary to the fourteenth amendment of the Federal Constitution.

Therefore, based on the Copperweld decision, in order for the Court of Ordinary to have jurisdiction in Petitioner's case, as a matter of law, Ga. Statute 113-1005 (App.), objections had to be filed to the Year's Support during the four weeks in which citation ran and before the return of the appraisers was affirmed and signed by the Ordinary and became a final statutory judgment conclusive upon all parties concerned.

As a matter of fact (R-A-17), objections were not filed, and since the statute does not give the Court of Ordinary any power, discretionary or otherwise, to act, once a valid statutory judgment for a Year's Support is signed and recorded, and since, as a matter of law, said statute must be

strictly construed, Petitioner contends that the Courts of Georgia cannot confer jurisdiction upon the Court of Ordinary to set aside a valid statutory judgment for a Year's Support, in order to allow Respondent to file objections to said Year's Support and deprive Petitioner of her vested property, without being guilty of denying to Petitioner her Federal rights of due process and equal protection of the law.

In *Angel* v. *Gullington, N. C.* 1947, 67 S. Ct. 657, 330 U. S. 183, 91 L. Ed. 832, this Court held:

"Where an asserted Federal right is denied, the sufficiency of grounds of denial is for the U. S. Supreme Court to decide."

The Court of Appeals admits in its opinion (R-A-86) that a Federal right has been denied to Petitioner, therefore, the sufficiency of grounds of denial is for this Court to decide.

Urie v. *Thompson, Mo.* 1949, 69 S. Ct. 1018, 337 U. S. 163, L. Ed. 1282 holds as follows in support of Petitioner's contentions:

"On certiorari to review judgment of State Supreme Court rendered on a second appeal, the U. S. Supreme Court could take judicial cognizance of the nature and effect of judgment rendered by State Supreme Court on first appeal, where such matters were disclosed by opinions of State Supreme Court."

(8) "Plaintiff did not waive right to review of adverse ruling by amending his complaint, in conformity with State Supreme Court mandate. . . . A statement of the course taken by the proceedings in the State Courts, as well as of the facts, becomes necessary for resolving the issues presented."

(11) "The power of the U. S. Supreme Court to probe

issues disposed of on appeals prior to the one under review is a necessary correlative of rule which limits it to examination of final judgments."

(12) "When litigation in State Court is brought to a conclusion, case may be brought to the U. S. Supreme Court upon Federal question already raised as well as any that may be raised thereafter, 28 U. S. C. A. 1257 (3)."

The opinion (R-A-84-89) now before this Court clearly shows that the denial of the Federal right was disposed of and the *Urie* case supports Petitioner's contention that this Court should go into the record and decide for itself whether or not the rights granted under the U. S. Constitution have been denied to Petitioner.

A glance at the record will clearly show that the question of the denial of said right was duly and legally raised by amendment (R-A-41-44) and was properly before the court for consideration; that the trial court overruled the amendment and the Court of Appeals sustained the overruling of said amendment; that the opinion (R-A-86) in effect holds that the question of the denial of Federal rights was raised by Petitioner's general demurrer filed in the Court of Ordinary June, 1951, but that said issue was disposed of by the ruling of said court in 87 Ga. App. 142, and that, since on the former appeal it was not contended that said Federal right was raised, it was too late to raise it.

Petitioner contends that the denial of her Federal rights could not be raised until such rights were denied to her. That, in 87 Ga. App. 142, when a majority of said Court of Appeals conferred jurisdiction upon the Court of Ordinary contrary to statutory enactment and when a majority of the Supreme Court of Georgia denied Petitioner's writ of certiorari to the Court of Appeals, the majority of said Appellate Courts then and there injected the Federal question into the case for the first time. That said ruling

was unexpected and could not have been reasonably anticipated, particularly in view of the Court's former decision in 85 Ga. App. 498, *Hall* v. *First National Bank of Atlanta,* the law of the case, and since the decision in 87 Ga. App. 142 was not a final termination of the case this Court had no jurisdiction of the matter and Petitioner excepted to such rulings at the proper time—in the trial court—and in the only manner legally available to her—by amendment.

SECOND, the Courts of Georgia have interpreted a mere agreement between a husband and wife as permanent alimony contrary to statutory enactment defining permanent alimony, Ga. Statutes, 30-201 and 30-210 (App.), and contrary to the Supreme Court of Georgia's previous determination and application of said statutes, *Hayes* v. *Hayes,* 191 Ga. 237, and contrary to the law of contracts, said contract failing to waive the widow's vested statutory right to a Year's Support.

The Court of Appeals of Georgia and the Supreme Court of California have rendered conflicting opinions and have reached opposite conclusions in considering the question of a property settlement agreement between husband and wife waiving statutory rights when said agreements make no reference to waiving said rights. *Hall* v. *First National Bank of Atlanta,* 89 Ga. App. 853, which decision is the subject of this certiorari, and *Butler* v. *Mill,* Cal. (1944), 144 P. 2d 91. The Hall case holds that a mere agreement between husband and wife bars the widow from her vested statutory right to a Year's Support even tho the agreement fails to waive said statutory right, whereas, the California case holds that since the agreement did not waive the widow's statutory right to a homestead she was entitled to said homestead. Such a conflict between the highest courts of the States can only be resolved by a decision of

this Court, and should be resolved in order to bring about uniformity of opinion as to waiver of statutory rights.

Petitioner contends that the Courts of California have abided by constitutional law, whereas, the Courts of Georgia have disregarded the law. That when a husband and wife enter into a mere property settlement agreement and said agreement does not waive a vested statutory right that, under the law of contracts, the vested statutory right is valid and the Courts of Georgia, in holding otherwise, have deprived Petitioner of her vested property without due process of law and equal protection of the law.

The Court of Appeals of Georgia and the Supreme Court of Colorado have also rendered conflicting opinions and have reached opposite conclusions regarding property settlement agreements between husband and wife where the parties have requested and the agreement has become a part of a final divorce decree. *Hall* v. *First National Bank of Atlanta,* 89 Ga. App. 853, the subject of this certiorari, and *Gavette* v. *Gavette,* 88 P. 2d 964, 104 Colo. 71. The Hall case holds that a mere agreement between husband and wife is permanent alimony and has an independent status even tho said agreement was made a part of a divorce action (R-A-80) and the divorce was denied by a jury (R-A-80), whereas, the Colorado case holds that once a request is made for a separation agreement to become a part of a final divorce decree, such agreement ceases to have an independent status and is governed by the decision rendered in said divorce action. Such a conflict between the highest courts of the States can only be resolved by a decision of this Court, and should be resolved in order to bring about a uniformity of opinion as to separation agreements between husband and wife when said agreements have become a part of a final divorce decree.

The Courts of Georgia have consistently held that prayers

for alimony, being incidental to suit for divorce, cannot be maintained as independent actions, but must fall with the divorce suit. *Mullally* v. *Mullally* and cases cited therein (1945), 199 Ga. 708, 709 (3) (35 S. E. 2d 199). However, in the case at bar said courts have made an exception to this rule. The record shows that the alleged property agreement in question was entered into based on a divorce action pending (R-A-74), which divorce action was dismissed by the parties thereto (R-A-79). That later the deceased party made said agreement a part of a second divorce action (R-A-80) which went to trial and was denied by a jury (R-A-80). Petitioner contended and now contends that the alleged agreement fell with the denial of said divorce (R-A-80) and said agreement has no independent status which argument is substantiated by the Courts of Colorado in the *Gavette* case.

THIRD, Petitioner cites the irregularity of procedure in this case, the Courts of Georgia having ignored procedure in favor of Respondent. Ga. Statutes 24-2105, 81-1301, and 81-1310 (App.).

In *Young* v. *Ragen*, Ill. 1949, 69 S. Ct. 1073, 337 U. S. 235, 93 L. Ed. 1333 this Court held:

"A State may choose the procedure it deems appropriate for the vindication of Federal rights, but where State Courts of last resort close the door to any consideration of a claim of denial of a Federal right, it is not simply a question of State procedure."

Based on this decision and the Georgia statutes cited above Petitioner has been denied her Constitutional rights as to procedure because the record shows that the petition (R-A-19-21) filed by Respondent June 25, 1951 and the order (R-A-22) entered thereon dated June 26, 1951 were contrary to said statutes and the motion to dismiss (R-A-

26) and the demurrer (R-A-27) filed by Petitioner were good and should have been sustained. That Petitioner's exceptions pendente lite (R-A-29-30) to the orders of the Ordinary were good. That, at the proper time and in the manner provided by law, Petitioner raised the question of the denial of her Federal rights and that, based on the decision rendered in the Young case, this Court should go into the facts as set forth in the record and ascertain whether or not Petitioner has been denied her Federal rights of due process and equal protection of the law.

Further, Petitioner cites the fact that at no time during the history of the case does Respondent name or indicate the party or parties who are to benefit from the estate in question, if there be such party or parties to so benefit therefrom, that Respondent does not give any legal reason why Petitioner, as the widow and sole heir at law, should not be entitled to said estate other than that she is barred by the alleged property settlement agreement, which agreement (R-A-74-76) shows on its face that it is most unfair, unreasonable and unequitable in view of the husband's financial status at the time said agreement was entered into and which agreement makes no reference to waiving Petitioner's vested statutory right to a Year's Support, and which agreement was at all times herein complained of in the hands of Respondent yet was not offered as an objection until after Petitioner had obtained a valid statutory judgment and the property in question vested in her strictly according to the rules of law as made and provided. Said agreement is the basis upon which the Courts of Georgia have conferred jurisdiction upon the Court of Ordinary by granting to said Court of Ordinary discretionary power to act in a matter strictly contrary to statutory enactment.

This is a Federal question of substance previously determined and applied by this Court in *Arenas* v. *U. S.*, 322 U. S. 419, 88 L. Ed 1363, 64 Sup. Ct. 1090 which held:

"Even in some discretionary matters, if an official acts solely on grounds which misapprehend the legal rights of the parties, an otherwise unreviewable discretion may become subject to correction."

WHEREFORE, Petitioner prays that this petition be granted, and for such other and further relief in the premises as may be proper and just.

This the 12th day of October, 1954.

LUCIAN J. ENDICOTT,
205 P'tree Arcade,
Atlanta, Ga.,
Attorney for Petitioner.

Acknowledgment of Service

Due and legal service of the within and foregoing Petition for Writ of Certiorari of Mrs. Nellie Goins Hall is hereby acknowledged, copy received, and all other and further notice and service waived.

This 29th day of September, 1954.

WILLIAM K. MEADOW,
SPALDING, SIBLEY, TROUTMAN, & KELLEY,
Attorneys for Respondent in Certiorari.

APPENDIX "A"

COURT OF APPEALS OF GEORGIA

35094

HALL v. FIRST NATIONAL BANK OF ATLANTA, EXR.

BY THE COURT:

1. Rulings by the trial court on the sufficiency of pleadings, which have been affirmed on appeal, are the law of the case, insofar as they are applicable, in all subsequent proceedings. Such rulings, even if erroneous, are controlling and are not violative of constitutional provisions as being a denial of due process of law.

2. An executed separation agreement between a husband and wife which has not been subsequently invalidated by agreement, by a renewal of the matrital status, or by other means recognized in law, which agreement is in satisfaction of all rights to alimony, is admissible in evidence, and its effect is to bar the right of the widow to a year's support.

3. Where a judgment in a case has been thereafter vacated by the court at the same term, in the exercise of its discretion and plenary powers, and the judgment vacating and setting aside the former judgment has been affirmed on appeal, the first judgment is a nullity, and there is no error in refusing to admit the same in evidence.

4. Certain of the special grounds of the amended motion for new trial are incomplete in the respects set out in the corresponding division of this opinion.

This is the third appearance of this case in this court. In *Hall* v. *First National Bank of Atlanta,* 85 Ga. App. 498 (69 S. E. 2d 679) it was held that the judge of the superior court erred in not passing upon the demurrers and objections of the plaintiff in error to a petition filed by the de-

fendant in error as executor, seeking to set aside a judgment of the court of ordinary allowing a year's support to the applicant. In *Hall* v. *First National Bank of Atlanta,* 87 Ga. App. 142 (73 S. E. 2d 252), it was held not an abuse of discretion for the judge of the superior court to vacate and set aside a judgment of the court of ordinary allowing a year's support, and that accordingly the applicant's general demurrer and motion to strike the petition of the executor were properly overruled. Upon the return of the case to the superior court the plaintiff filed an amendment, which was disallowed, and made a motion to dismiss the petition and caveat, which was overruled. The case proceeded to trial, and a verdict was directed in favor of the defendant. The plaintiff made a motion for a new trial on the general grounds, which was later amended by the adding of 10 special grounds. Error is assigned on the disallowance of the amendment the denial of the motion to dismiss, and the denial of the motion for a new trial as amended.

TOWNSEND, *J.:*

1. The doctrine of law of the case includes every applicable proposition of law actually applied to the pleadings involved; and a rule thus announced, so far as it relates to the case in which it was laid, is, in all subsequent proceedings therein, binding alike upon the trial court and the appellate court announcing it. *Union Central Life Ins. Co.* v. *Trundle,* 65 Ga. App. 553 (15 S. E. 2d 909); *Willingham Stone Co.* v. *White-Stone Marble Co.,* 36 Ga. App. 230 (2) (136 S. E. 180). It follows that the court properly overruled both the "amendment" of the plaintiff to her objections to the executor's petition to vacate the year's support judgment, and the motion to dismiss such petition, filed in May, 1953, since they raised exactly the same questions

which had been raised by her general demurrer and motion to strike of June, 1951, which latter were held by this court on appeal to have been properly overruled. This is in effect conceded by certain portions of the disallowed amendment, in which it was alleged that the refusal to dismiss the executor's petition was error, and that adherence to such error has the effect of depriving the plaintiff of her constitutional rights. As to this contention, in the first instance, it was not contended on the former appeal that the overruling of the plaintiff's demurrer to the executor's petition deprived her of any constitutional rights, for which reason it is too late to raise such question now, even if it were otherwise properly raised. In the second place, an erroneous decision by an appellate court is not ordinarily a ground for attack on constitutional grounds, because, as stated in *Lombard* v. *West Chicago Park Commissioners,* 181 U. S. 33 (21 Sup. Ct. 507, 45 L. ed. 731): "If the proposition as thus understood was held to be sound, as it can not be, every case decided in the courts of last resort of the several States would be subject to the revisory power of this court, wherever the losing party deemed that the reasoning by which the State court had been led to decide adversely to his rights was inconsistent with the reasoning previously announced by the same court in former cases." See also *Harris* v. *Woodard,* 144 Ga. 211 (86 S. E. 109.) These exceptions are without merit.

2. Special ground 1 of the amended motion for new trial assigns error on the admission in evidence of a contract and separation agreement between the plaintiff and the intestate, dated September 30, 1940, in which the intestate agreed to give, and the plaintiff agreed to accept, certain real and personal property "in full and complete settlement of both temporary and permanent alimony." This agreement was competely executed by the parties, and was not

thereafter annulled by subsequent cohabitation. Special grounds 6 and 7 assign error on the direction of a verdict on the ground that there were issues of fact which the jury should have passed upon.

The executed separation agreement was relevant and material to the issues being tried, and was accordingly properly admitted in evidence. See *Powell* v. *Powell,* 199 Ga. 723(3) (35 S. E. 2d 298). The Powell case dealt with the wife's right to alimony, and we are here dealing with the widow's right to a year's support, but the admissibility and effect of the contract is the same in any event, since, under the provisions of Code §30-218, the allowance of permanent alimony to the wife bars her of her rights to a year's support from her husband's estate. *Hall* v. *First National Bank of Atlanta,* 87 Ga. App. 142, 146 (73 S. E. 2d 252). And this is true although the contract is not made the decree of court, and although it does not specifically state that it is "in lieu of year's support." *Gore* v. *Plair,* 173 Ga. 88 (159 S. E. 698). Permanent alimony may be acquired by the wife from her husband either by virtue of a decree of court or by contract between the parties made at a time when they are living in a bona fide state of separation, and where the marital relation is not subsequently renewed. Code §30-217. Such a contract, which has been executed, and which has not been annulled by subsequent cohabitation and reconciliation, is a bar to a year's support from the husband's estate.

The judgment of the superior court vacating and setting aside the order of the ordinary granting the year's support, which judgment was affirmed in *Hall* v. *First National Bank of Atlanta, supra,* became the law of the case that this judgment was not an abuse of the discretion of the judge of the superior court. Since the wife had accepted the property from her husband under the contract between them pro-

viding for permanent alimony, at a time when they were living in a bona fide state of separation, and since at the time of the death of her husband they had not resumed their marital status, such executed contract was an allowance of permanent alimony which bars her from recovery of year's support. Inasmuch as this is true as a matter of law, there were no facts presented to the jury which would have authorized a verdict to the contrary. Accordingly, it was not error for the trial court to direct the jury to return a verdict against the allowance of the year's support.

3. Since the original judgment of the ordinary approving the year's support had been vacated and set aside by the judge of the superior court, which judgment was affirmed by this court, such original judgment was a nullity, and there was no error in refusing to allow the same in evidence.

4. (a) "Assignments of error that the court erred in holding a stated legal proposition, or in failing to hold another proposition, without showing how he so held or failed to hold, or any distinct ruling on the subject, do not sufficiently invoke the decision of this court further than as a consideration of the point may be involved in an exception to the direction of a verdict." *Real Estate Banking & Trust Co.* v. *Baldwin Locomotive Works,* 145 Ga. 831 (6a) (90 S. E. 49). Accordingly, the second special ground of the amended motion for a new trial is without merit.

(b) Special grounds 3, 4, and 10 assign error on rulings on pleadings. Since rulings on pleadings cannot be excepted to in a motion for a new trial, these grounds present no question for decision. *Padgett* v. *Reeves,* 86 Ga. App. 137 (2) (70 S. E. 2d 922); *Fillingame* v. *Campbell,* 87 Ga. App. 481 (2) (74 S. E. 2d 392).

(c) Grounds of an amended motion for new trial which

seek to assign error on the admission or exclusion of testimony, but which fail to set out the testimony given or expected, or the objection offered thereto, are too incomplete for consideration. *Fillingame* v. *Campbell, supra.* Accordingly, special grounds 8 and 9 present no question for decision.

The trial court did not err in disallowing the plaintiff's amendment to her objections, nor in denying the motion to dismiss the petition of the executor or the motion for a new trial as amended.

Judgment affirmed. Gardner, P. J., and Carlisle, J., concur.

Decided March 11, 1954.

APPENDIX "B"

COURT OF APPEALS OF THE STATE OF GEORGIA

35094

ATLANTA, March 11, 1954.

The Honorable Court of Appeals met pursuant to adjournment. The following judgment was rendered:

NELLIE G. HALL v. FIRST NATIONAL BANK OF ATLANTA, EXR.

This case came before this court upon a writ of error from the Superior court of Fulton county; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. Gardner, Townsend and Carlisle, JJ., concur.

FILED
DEC 23 1954
HAROLD B. WILLEY, C

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 395

MRS. NELLIE GOINS HALL, Widow of James Oscar Hall, Deceased,

Petitioner,

vs.

FIRST NATIONAL BANK OF ATLANTA, Executor of the Estate of James Oscar Hall,

Respondent

PETITION FOR RECONSIDERATION OF APPLICATION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA.

Lucian J. Endicott,
205 P'tree Arcade,
Atlanta, Ga.,
Attorney for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 395

MRS. NELLIE GOINS HALL, WIDOW OF JAMES OSCAR HALL, DECEASED,

Petitioner,

vs.

FIRST NATIONAL BANK OF ATLANTA, EXECUTOR OF THE ESTATE OF JAMES OSCAR HALL,

Respondent

PETITION FOR RECONSIDERATION OF APPLICATION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA.

To the Honorable Chief Justice of the United States and to the Honorable Associate Justices of the Supreme Court of the United States:

Now comes Mrs. Nellie Goins Hall, applicant for a writ of certiorari in the above styled case, within the time provided by law, and files this her motion for reconsideration, her petition for writ of certiorari having been denied by this Honorable Court December 6, 1954, and same being adverse to her contentions.

Applicant moves for a reconsideration on the grounds hereinafter set out and contends that this Court, in denying

certiorari in said case, has overlooked each and every one of said grounds, and had it considered same a different decision would have been required.

1

Applicant respectfully contends that this Court, in its denial of certiorari, has overlooked the question of the denial of her constitutional rights as contained in the Federal Constitution which question was properly raised by way of amendment in the trial court (R. A. 41-44) which is as follows:

Amendment

"Now comes Mrs. Nellie Goins Hall, appellant in the above styled case, and amends her appeal by adding thereto these her grounds of objection to the petition, the petition as amended, and the caveat filed thereto by the First Natl. Bank of Atlanta to vacate and set aside the valid statutory judgment of the court of ordinary of Fulton County allowing her a year's support out of the estate of her deceased husband, James Oscar Hall, and also the judgment rendered therein setting aside her valid statutory judgment for a year's support in order that her appeal, after amendment, may contain the following grounds of objection:

1

Appellant objects to the allowance of said petition, said petition as amended, and said caveat allowed thereto on the grounds that same are repugnant to both the State and Federal Constitutions in that the court of ordinary had no jurisdiction to act in said matter, nor did the superior court on appeal acquire jurisdiction in said case, because said judgment allowing the year's support is a statutory judgment, had according to the

rules of statute, said statute providing the exact method whereby the court of ordinary would have jurisdiction in said matter. Appellant shows that said statutory provision was not complied with by the First Natl. Bank and when the Court of Appeals sustained the ruling of the lower court and held that the ordinary had discretionary power to act in this case the State then and there denied the widow her due process of law as guaranteed in the 14th amendment of the Federal Constitution because the established principles of law must be adhered to in all matters affecting jurisdiction, and departure from these established principles constitutes a denial of due process of law.

2

Appellant objects to the allowance of said judgment setting aside the year's support on the grounds that said judgment is void, same being repugnant to both the State and Federal Constitutions. The court of ordinary had no jurisdiction to act in the matter and since under our statute law a void judgment may be attacked in any court at any time the constitutionality of said judgment is hereby attacked.

3

Appellant objects to the allowance of said petition on the grounds that a year's support is a vested statutory right whereby absolute title to a year's support vests in the widow immediately upon the death of her husband, and on the grounds that property set aside by the appraisers and confirmed by a judgment of the ordinary is a statutory right whereby the property vested directly in the widow, therefore, since the State has no power under the Federal Constitution to divest

or impair vested rights except as provided by law, objections filed during the time allowed by law as contained in the 1933 Code of Ga., Secs. 113-1005, and said objections were not filed in this case in conformity with the law as contained in said code section, when the Court of Appeals of the State of Ga. sustained the ruling of the lower court and allowed the pleadings of the First Natl. Bank setting aside a valid statutory judgment for a year's support the State then and there denied the widow her vested rights as guaranteed under the State and Federal Constitutions.

4

Appellant objects to said petition on the ground that said petition shows on its face that the pleader is not entitled to the relief prayed for at law or in equity.

5

Appellant objects to said petition on the ground that said petition does not comply with the law in that said petition is not verified as required by law.

6

Appellant objects to said petition on the ground that said petition shows on its face that it does not comply with the law as regards service in such matters. The law requires that the opposite party be given ten days notice and said petition was filed on June 25, 1951, ordering appellant to show cause at 9 A. M. on June 28, 1951 why said judgment allowing the year's support should not be set aside. Appellant did not waive said notice at said time and does not now waive said notice.

7

Appellant objects to said petition on the ground that same is in effect a motion for a new trial and is addressed to the court of ordinary, a court that has no power to grant a new trial.

8

Appellant objects to the amendment to said petition allowed and ordered filed by the ordinary on June 28, 1951 on the grounds that said petition is not a petition and therefore cannot be amended, and further on the grounds that said amendment attempts to set forth a new cause of action and is not verified as required by law.

9

Appellant objects to the caveat filed by the First Natl. Bank on June 28, 1951 on the ground that said caveat was filed after the final judgment for the year's support had been rendered in the court of ordinary in said matter and the court of ordinary had no jurisdiction to allow and order said caveat filed, and the allowance and filing of said caveat was and is contrary to law and repugnant to both the State and Federal Constitutions in that the allowance of said caveat is depriving the widow of her property without due process of law, and also denying the widow equal protection of the law as guaranteed in said Constitutions.

10

Appellant shows that the ordinary, in overruling her objections and demurrers, and in allowing said petition to be amended and said caveat to be filed, and in vacating and setting aside her valid statutory judgment

for a year's support, the superior court on appeal affirming said ruling of the ordinary, and the Court of Appeals of Ga. sustaining and affirming the ruling of the superior court, is contrary to law because same is repugnant to article 1, sec. 1, paragraph 2 of the Constitution of the State of Ga. in that appellant has not been shown complete and impartial protection of the law (the appellate court having failed to uphold our statutory law); same is repugnant to article 1, sec. 1, paragraph 3 of said Constitution in that appellant has been deprived of her property without due process of law (the appellate court having failed to uphold our statutory law); also said ruling is contrary to law because same is repugnant to paragraph 1 of the 14th amendment to the Federal Constitution in that appellant has been deprived of her property without due process of law and denied the equal protection of the law by the State court.

WHEREFORE, appellant prays that these her amendments be allowed, ordered filed and be made a part of the record in said appeal. (Signed) Lucian J. Endicott, Atty. for Appellant.

GEORGIA, Fulton County, Clerk's Office Superior Court. Filed May 18, 1953. Rec. May 21, 1953. J. W. Simmons, Clerk.

Order

The above and foregoing amendments are hereby allowed and ordered filed, subject to objection and demurrer.

This 18th day of May, 1953. (Signed) Judge Jesse M. Wood.

The above order allowing amendments is hereby vacated and set aside.

This May 18th, 1953. (Signed) Jesse M. Wood, Judge S. C. A. C.

Affidavit

Before the undersigned Notary Public, duly authorized to administer oaths, personally appeared Mrs. Nellie Goins Hall who, being duly sworn, on oath says that at the time of filing her original appeal she did not omit the defense of the denial of her constitutional rights for the purpose of delay, and that this amendment is not offered for delay but is made for the sole purpose of making these her objections to the denial of constitutional rights a part of the record. (Signed) Mrs. Nellie Goins Hall. Sworn to and subscribed to before Mary C. Endicott, Notary Public, this 16th day of April, 1953."

Appellant contends that the denial of her constitutional rights was not in issue until the majority of the Court of Appeals made their unexpected and contradictory ruling in 87 Ga. App. 142. Therefore, the above quoted amendment was in order. She further contends that, even tho an appellate court's decision is rarely questioned, as set forth by the Court of Appeals in its final decision, 89 Ga. App. 853, App. A & B, that no court is infallible and when a State appellate court ignores and fails to abide by statutory law and ignores and fails to be governed by the previous decisions of the appellate courts and thus deprives a citizen of her vested rights and vested property then it is clearly up to this court to take jurisdiction and reverse the State court.

2

Applicant respectfully shows that it is proper, essential, and necessary for this court to grant her certiorari for the following reasons:

The controlling question raised in this case relates to the validity, under the Constitution of the United States, of certain provisions in the Constitution and statutes of the State of Georgia with reference to the authority granted to the court of ordinary pertaining to the granting of a Year's Support. In view of the provision for a Year's Support, same being purely a statutory provision, it is meet and proper to look to the legislation of Georgia and the previous decisions of the highest courts in said State rendered on the requirements of law relating to the granting of a Year's Support.

The 1933 Code of Ga., 113-1002 reads as follows:

> "Year's support to family; appraisers, appointment and duties of; amount of estate set aside; taxes and tax liens.—Among the necessary expenses of administration, and to be preferred before all other debts, except as otherwise specially provided, is the provision for the support of the family, to be ascertained as follows: Upon the death of any person testate or intestate, leaving an estate solvent or insolvent, and leaving a widow, or a widow and minor child or children, or minor child or children only, it shall be the duty of the ordinary, on the application of the widow, or the guardian of the child or children, or any other person in their behalf, on notice to the representative of the estate (if there is one, and if none, without notice), to appoint five discreet appraisers; and it shall be the duty of such appraisers, or a majority of them, to set apart and assign to such widow and children, or children only, either in property or money, a sufficiency from the estate for their support and maintenance for the space of 12 months from the date of administration, in case there is administration on the estate, to be estimated according to the circumstances and standing of the family

previous to the death of the testator or intestate, and keeping in view also the solvency of the estate. If there is a widow, the appraisers shall also set apart, for the use of herself and children, a sufficient amount of the household furniture. The amount set apart for the family shall in no event be less than the sum of $100; and if it shall appear upon a just appraisement of the estate that it does not exceed in value the sum of $500.00, it shall be the duty of the appraisers to set apart the whole of said estate for the support and maintenance of such widow and child or children, or, if no surviving widow, to the lawful guardian of the child, or children, for their benefit: Provided, that all taxes and liens for taxes accrued against property, an equity of redemption in which is embraced in a year's support duly set apart, shall be thereby divested, the same as if the entire title were included in such year's support."

This statutory law sets up the requirements to entitle a widow or minor to a year's support. The facts contained in the record of this case, pages 1, 2, and 3, show beyond every reasonable doubt that applicant was legally entitled to said year's support and that she obtained same strictly according to the rules of law as made and provided by the Legislature of Georgia, same being awarded to her by a valid statutory judgment.

The 1933 Code of Ga., 113-1005 reads as follows:

"Same; return by appraisers. The appraisers shall make a schedule of the property, or statement of the amount of money set apart by the ..., and return the same under their hands and seals to the ordinary within 30 days from the date of their appointment. Where any lands shall be included in the property set apart and assigned as a year's support, the appraisers so ap-

pointed in their return shall fully and accurately describe said land, and make a plat thereof, and they shall have power to procure the aid of the county surveyor of the county, or other competent surveyor, in making the survey and measurement of the lands so set apart, who shall be required to make a careful plat of the lands so set apart showing the lengths of the boundary lines (except crooked natural boundaries), and the directions in which they run, and setting out all original lines and natural boundaries, so as to definitely and accurately describe the lands so set apart, which plat shall be made and recorded as a part of the appraisers' return. Upon filing said return, the ordinary shall issue citation and publish notice as required in the appointment of permanent administrators, citing all persons concerned to show cause why said application for 12 months' support should not be granted; and if no objection is made after the publication of said notice for four weeks, or, if made, is disallowed, the ordinary shall record the return so made in a book to be kept for this purpose; if an appeal is taken, pending the appeal the family shall be furnished with necessaries by the representative of the estate."

This code section gives the court of ordinary the only power said court has to act in this matter and by its very provisions also limits this power. This particular code section has been interpreted by the highest courts of Georgia many, many times and the substance of each and every interpretation has been substantially as set forth in *Howell* v. *Howell*, 190 Ga. 374:

"The Code, sec. 113-1005, has several times been construed by this court with respect to the time within

which objections must be filed, and it has been held that they must be filed at or before the term to which the citation is returnable. Parks v. Johnson, 79 Ga. 567 (S. E. 243); Jackson v. Warthen, 110 Ga. 812 (2) (36 S. E. 234); Foster v. Turnbull, 126 Ga. 654 (55 S. E. 925); Reynolds v. Norvell, 129 Ga. 512 (3) (59 S. E. 299). In Jackson v. Warthen, supra, it was held that 'unless objections are duly filed, nothing is left for the ordinary to do but to record the return of the appraisers, which then becomes, in effect, a binding judgment, conclusive upon all persons interested."

3

Applicant contends that the facts contained in the record of this case (R-1, 2, 3) clearly show that respondent herein failed to file any objections to her application for a Year's Support as required by law, that she obtained a valid statutory judgment for a Year's Support in accordance with the above quoted statutes and authority, that said statutory judgment was conclusive upon all parties and the ordinary had no power whatsoever, discretionary or otherwise, to vacate said judgment allowing the Year's Support and thus allow respondent to file objections as was done in this case. Applicant further contends that the appellate courts of Georgia had no power or authority whatsoever under statutory law to confer jurisdiction upon the court of ordinary contrary to statutory enactment and contrary to all previous decisions. Therefore, said appellate courts have deprived applicant of her vested rights and vested property without due process and equal protection of law.

It was held in *Holamon* v. *Jenkins*, 50 Ga. App. 129:

"Where no objection is filed to the return of appraisers setting apart a year's support to a widow under

the Civil Code, 113-1005, and the return, after due citation and notice, is recorded by the ordinary, 'such a record has the binding force and effect of any other judgment,' without the need of any other act by the ordinary or power on his part to modify the return. Jackson v. Warthen, 110 Ga. 812, 814 (2) (36 S. E. 234); Selph v. Selph, 133 Ga. 409, 410 (2) (65 S. E. 881); Moore v. Moore, 126 Ga. 735, 738 (55 S. E. 950); Watson v. Watson, 143 Ga. 425, 427 (85 S. E. 324); Fulghum v. Fulghum, 111 Ga. 637 (36 S. E. 602, 37 S. E. 774). *This for the reason that unless objections are filed, any further duties on the part of the ordinary are purely ministerial.* (our italics)"

In the case of *Foster* v. *Turnbull*, 126 Ga. 654 it was held:

"Where an application has been made by a widow for the setting apart of a year's support from the estate of her deceased husband, and, after notice has been given to the legal representative of the estate, appraisers have been appointed and have made a return, and citation has been published, objections may be made at or before the next term of the court of ordinary. The matter, however, stands for final disposition at the first term; and if objections are not made until such term, they should be made before final action is taken upon the application. If no objection is made until after the application has been finally acted on, it is then too late to file objections."

The facts contained in the record of the Hall case (R-1, 2, 3) clearly show that the final action by the ordinary had been taken, that is, a valid statutory judgment for the Year's Support had been allowed and recorded. Therefore, under statutory law, even during the same term, the court

of ordinary had no power, discretionary or otherwise, to set aside a valid statutory judgment and it was so held in *Hall* vs. *First Natl. Bank of Atlanta*, 87 Ga. App. 142, by the Honorable Jule Felton wherein he so ably and forcefully sets forth these contentions in the dissenting opinion as follows:

> "Assuming for the sake of argument that Mrs. Hall's representation that she was entitled to a year's support was such a fraud as would authorize the setting aside of the year's support judgment if all other requisite condition existed, I think that the vital question in this case is controlled by the principle that a judgment will not be set aside even at the term at which it was rendered for a reason which could have been urged before the judgment was rendered, and this covers the ground of fraud, as well as any other ground. Hogg v. Hogg, 206 Ga. 691 (58 S. E. 2d, 403). The Supreme Court has settled the question in several cases. The question whether negligence of the moving party precluded his right to have a judgment not based on a verdict set aside at the same term was clearly ruled on by the Supreme Court in Dougherty-Little-Redwine Co. v. Hatcher, 169 Ga. 858 (151 S. E. 796). The matter referred to was not fraud, but the principle is the same. The Hatcher case was cited with approval on the same question in Cahoon v. Wills, 179 Ga. 195 (175 S. E. 563), and Hurt Building v. Atlanta Trust Co., 181 Ga. 274 (182 S. E. 187), and by this court in Morris v. Morris, 82 Ga. App. 384 (61 S. E. 2d 156). These decisions mean, in my judgment, that the ground which will authorize the setting aside of a judgment, *even at the term at which rendered*, is such a one as could not have been urged before the rendition of the judgment sought to be set aside. So the rule as to the setting aside of judgments during

the same term is the same as the rule applying in equity cases as to judgments sought to be set aside after the expiration of the terms when rendered. Young v. Young, 188 Ga. 29 (S. E. 2d, 622), and cases cited. The executor forcefully urges that the extrinsic fraud or extrinsic cause rule does not apply to the power of a court to vacate a judgment not based on a verdict at the same term, and that a court has the inherent power to vacate a term judgment not based on a verdict, even if fraud is absent, on broad principles, in its discretion, to promote justice. This power has been limited to a mere legal discretion so many times that citations to that effect are unnecessary. The Supreme Court cases cited control in my opinion this case, and I have no recourse other than to bow to them as binding precedents regardless of what my private opinion is as to the common-law rule as applied to the facts in this case. Mobley v. Mobley, 9 Ga. 247, is not contrary to the cases cited, because in the Mobley case the plaintiffs were minors without guardians. The executor contends that the ruling in the Hatcher case, supra, is not in point. I think that the record shows to the contrary. It is true that the bill of exceptions in that case states that he only issue involved was the validity of the judgment setting aside a year's support for Mrs. Hatcher. However, the judge of the superior court affirmed the auditor's rulings in the case and this judgment was excepted to. One of the rulings of the auditor was that the demurrer of Mrs. Hatcher to the petition for injunction, etc., should be sustained. In the receiver's petition to the court of ordinary to set aside the judgment awarding a year's support, it alleged that it had certain valid defenses which it would have presented to the court had it had any notice of the proceedings, among which was the fact that the will of Clarence W. Hatcher

made provision for his widow in lieu of a year's support. The issue raised by Mrs. Hatcher's demurrer to this petition was by agreement passed on by the auditor. The auditor ruled that Mrs. Hatcher's demurrer to the petition to set aside should be sustained. The judge of the superior court affirmed the auditor's ruling and that judgment was excepted to. It seems to me that the issue was clear-cut in the Hatcher case whether the receiver could have set aside a judgment awarding a year's support, after citation was duly published, at the same term at which the judgment was rendered, on a ground which could and should have been urged before judgment. Whether the court should have treated with this question in view of the statement in the bill of exceptions that there was only one issue involved is beside the point. The court dealt specifically with the question and directly rules on it. If this ruling in the Hatcher case is obiter in that case, its citation on the same question in the other two cases makes the ruling in those two cases authoritative rulings in those cases. See Cofer v. Maxwell, 201 Ga. 846 (41 S. E. 2d, 420), to see to what extent the Supreme Court has gone in limiting a court's power during the term over its judgments. *Since the petition of the executor did not allege that it was ignorant of the contract which it alleged barred Mrs. Hall's year's support before the judgment setting apart the year's support,* the court erred in overruling the demurrer of Mrs. Hall to the petition to vacate the judgment awarding the year's support."

Applicant contends that the majority opinion of the Court of Appeals in *Hall* v. *First Natl. Bank of Atlanta,* 87 Ga. App. 142, in holding that the court of ordinary, as a court of record, had discretionary power to vacate and set aside the judgment allowing the year's support, misconstrued

and misapplied the law as contained in the Georgia statutes, and completely ignored the element of fraud, which element said court had previously held was an essential element in such cases, and which element said court had previously cited as the only element that would give the ordinary any authority to act in this case, *Hall* v. *First Natl. Bank of Atlanta,* 85 Ga. App. 498, which reads as follows:

> "Whether or not it would be an abuse of discretion for the ordinary, or the superior court on appeal from the court of ordinary, to vacate a judgment allowing a year's support at the term at which it is rendered, when the petition to vacate the order alleges no reason why objections were not filed before the court acted on the petition for a year's support (Foster v. Turnbull, 126 Ga. 654, 55 S. E. 925), such a court would have jurisdiction and power on motion to set aside such a judgment for fraud. Power v. Green, 139 Ga. 64 (76 S. E. 567); Davis v. Albritton, 127 Ga. 517 (56 S. E. 514); Walker v. Hall, 176 Ga. 12 (166 S. E. 757, 759); Gormley v. Watson, 48 Ga. App. 46 (S. E. 171 S. E. 880)."

Based on the above cited decision in said case, the statutory law, and the authorities cited herein, the decision, rendered by the majority of the Court of Appeals in 87 Ga. App. 142, was contrary to law and deprived applicant of her vested rights and vested property without due process of law and applicant questioned the denial of her constitutional rights at the proper time and in the only manner available to her—by way of amendment in the trial court.

It was held in *Ochoa* v. *Morales,* 230 U. S. 139, 140:

> "While the exact definition of the term 'Due process of law' may be uncertain, it is certain that the effect of the guaranty is to inhibit the taking of one person's

property and giving it to another *contrary to settled usages and modes of procedure.*" (our italics)

4.

Applicant shows that, under the statutory laws of Georgia, her only legal means of obtaining any part of her deceased husband's vast estate was by way of her vested right, that is, a year's support. That the Legislature of Georgia set up this particular law solely for the protection of widows and minor children. That the Legislature, that is the people of Georgia, never intended for any court to have power to intervene and circumvent this particular statute for a year's support because it was made for one purpose and one purpose only—the protection of widows and minors. That if the courts of Georgia are allowed to circumvent this statutory law without a legal cause of action and confer power on the court of ordinary contrary to statute then statutory law is nil.

Applicant is confident, beyond every reasonable doubt, that the courts of Georgia have denied her due process and equal protection of the law. Applicant is also confident that, if this Honorable court will review her petition for writ of certiorari previously filed, review all the facts as contained in the record, and the law and authorities cited herein which apply directly to this case, said court will reconsider the previous denial of her application for certiorari and will grant same because the courts of Georgia have violated article XIV, sec. 1, of the Constitution of the United States and unless this Honorable Court does intervene and reverse the courts of Georgia applicant will be deprived of her property, vested in her according to statutory enactment, the deprivation of which has all been brought about by the appellate courts of Georgia conferring

jurisdiction upon the court of ordinary contrary to statute and in violation of applicant's constitutional rights.

5.

Applicant respectfully contends that this Honorable Court overlooked each and all of the foregoing grounds, which it should have considered, and had it considered a different opinion would have been required.

WHEREFORE, applicant most respectfully prays that this Honorable Court look carefully into the record of this case in the light of the arguments and law herein cited, that said court reconsider and grant applicant's petition for writ of certiorari and thus correct the decision of the Court of Appeals of Georgia, and thereby uphold applicant's constitutional rights as guaranteed by the Constitution of the United States.

This the 18th day of December, 1954.

LUCIEN J. ENDICOTT,
205 P'tree Arcade,
Atlanta, Ga.,
Attorney for Petitioner.

Affidavit

I, Lucian J. Endicott, counsel for applicant for certiorari, do hereby certify that the within and foregoing motion for reconsideration of applicant's petition for certiorari is presented in good faith and not for delay. I believe that the Supreme Court of the United States has overlooked the material facts in the record, the law as contained in the Constitution and Statutes of the State of Georgia, and the decisions of the appellate courts of Georgia as applied thereto, which are controlling as authorities thereon, and which, upon reconsideration, would require a grant of certiorari, and that the Petition for Rehearing is restricted to the grounds herein specified.

LUCIEN J. ENDICOTT,
205 P'tree Arcade,
Atlanta, Ga.,
Counsel for Petitioner.

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